



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

JAN 26 2016

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

David R. Cooper
Chief Counsel HQ
U.S. Army Corps of Engineers
441 G Street, NW
Washington, D.C. 20314-1000

Re: Old Roosevelt Field Contaminated Groundwater Area Superfund Site, Garden City,
Nassau County, New York

Request for Information Pursuant to Comprehensive Environmental Response,
Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA")

Dear Mr. Cooper,

This letter is in reference to the United States Army Corps' of Engineers ("Corps") May 12, 2009 response to the U.S. Environmental Protection Agency's ("EPA's") February 11, 2009 CERCLA Request for Information ("Information Request") regarding the Old Roosevelt Field Contaminated Groundwater Area Site ("Site"), located in the Village of Garden City, Nassau County, New York. The Information Request was issued to the Corps pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 104(e). For your convenience, a copy of the Information Request is enclosed with this letter.

In response to question 11 of the Information Request regarding the existence of a PRP search, the Corps stated in its 2009 response that although there was a PRP search for the Site, the report associated with the PRP search was "attorney work product privileged" and therefore the Corps would not submit it as part of its response. In addition, in response to questions 1, 3, 4, 5, 6, 7,

and 8 in EPA's Information Request, the Corps' 2009 response stated in whole or in part that the answer was in the PRP search report.¹

As there can be no direct litigation between federal agencies in light of the unitary executive theory, please provide the basis for the Corps' assertion that the PRP search report is attorney work product and not releasable to EPA. If there were to be litigation related to the Site with nongovernmental entities, providing the report to EPA would not waive such a privilege vis-a-vis third parties. As you may be aware, courts have recognized that such an exchange of attorney work product documents between federal governmental agencies remain privileged against third parties. See *Menasha v. United States*, 707 F.3d 846 (7th Cir. 2013). Therefore, if EPA were to receive such a request for the PRP search report, our respective agencies would work together to protect the report from release to third parties.²

Prior to the issuance of the Information Request, the Corps provided EPA with some, but not all, of the supporting documentation for the PRP search report and turned over one of the appendices as part of its 2009 response. EPA and the Corps have had several telephone conversations regarding the sufficiency of the Corps response to the Information Request. EPA has determined that by failing to submit the PRP search report with its response, the Corps has failed or refused to fully comply with the Information Request.

On November 17, 2015, EPA met with Patsy M. Falcigno, Assistant Counsel for the North Atlantic Division, at your Brooklyn, New York offices. At that meeting, portions of the PRP search report were read to EPA and EPA was subsequently given additional appendices to the PRP search report. The meeting raised additional questions regarding the PRP search report contents and the conclusions reached in the document regarding the liability of the federal agencies at the Site.

It is imperative that the Corps immediately 1) submit a full copy of the PRP search report, including all appendices, interviews, tape recordings or documents associated with the report; and 2) fully answer the questions in the Information Request. As explained in the cover letter to the Information Request, failure to fully comply in all respects with the Information Request may result in EPA pursuing its enforcement options under CERCLA against the Corps. Those options include, but are not limited to, the assessment of penalties of up to \$37,500 per day for continued noncompliance, the issuance of an order compelling compliance with a request for information (with attendant penalties for any failure to comply with such an order), or the issuance of a subpoena to compel Corps personnel to appear before EPA and produce any responsive documents.

¹ In the Corps' response, the PRP Search report is referred to as the "Final Draft Investigation Report Site Ownership and Operations History Former Roosevelt Airfield (SOOH)."

² Even if the Corps' could substantiate its assertion of the attorney work product privilege as to some portions of the document, the Corps is nonetheless under an obligation to identify and redact those sections of the PRP search report for which it asserts the privilege would apply and provide the remainder. EPA knows of no authority for the Corps' withholding of the document from EPA in its entirety.

For your information, Sandra Levy, Assistant United States Attorney in the Eastern District of New York, has also been in communication with the Corps regarding this issue. Please contact Elizabeth Leilani Davis in our Office of Regional Counsel at davis.leilani@epa.gov or (212) 637-3249 to discuss this matter at your earliest convenience.

I urge you to give this matter your immediate attention.

Sincerely,



Nicoletta DiForte

Deputy Director for Enforcement
Emergency and Remedial Response Division

Enclosure

cc: Patsy Falcigno, North Atlantic Division Regional Business Center
Sandra Levy, AUSA-EDNY
Angeline Purdy, DOJ-EDS
Mark Gallagher, DOJ-EES